IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. 1409/2002
Reserved on: 30.4.2007
Date of decision 29.5.2007

Tek Chand. …Petitioners.

Versus

Union of India and others. …Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*.yes.*

For the petitioners : Mr. Bimal Gupta, Advocate .

For the respondents : Mr. Sandeep Sharma, Asstt. Solicitor of India.

Rajiv Sharma, J.

The brief facts necessary for the adjudication of this petition are that the petitioner was enlisted in Central Industrial Security Force (CISF) on 1.5.1985 and after training he was posted in ASP, Durgapur on 13th March, 1989. A memorandum was issued to the petitioner on 6th March, 1991 along with statement of article of charges. The statement of allegations is reproduced below:

> **"That the said No. 8570355 Constable Tek Chand of 'B' Coy CISF Unit, ASP Durgapur has absented from unit w.e.f 23.02.91 (AN) without any valid permission from the competent authority. He thereby exhibited lack of discipline, violation of duty and an act unbecoming of a member of the force."**

The statement of allegations in support of article of charges framed against the petitioner is also reproduced:

---

[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? Yes.

> **"That the said No. 8570355 Constable Tek Chand of 'B' Coy CISF Unit, ASP Durgapur was absented from games parade held at 1600 hrs, evening roll call hold at 1730 hrs, check roll call hold at 2000 hrs, absent from his duty in 'C' shift on 23.2.1991 and absent from unit w.e.f. 23.2.91. Thus the act of constable amounts to gross misconduct, violation of duty and an act of unbecoming of a member of the force."**

One Sh. S.K. Mondal, Assistant Commandant had completed the inquiry against the petitioner and furnished the same to the disciplinary authority. The copy of the inquiry report is at page 42 of the paper book. It will be apt to reproduce the conclusion of the inquiry officer as under:

> **"After going through the statements, records as mentioned above, I am of the opinion that the charge framed against CISF No. 8570355 Constable Tek Chand of CISF Unit ASP, Durgapur is proved beyond any doubt. But at the same time, being E.O. the mental condition of the charged constable cannot be over looked and as such recommended that the case may be considered taking into account of his chronic disease for which he was suffering at the time of his desertion from the unit."**

The disciplinary authority vide order dated 17th March, 1992 has imposed the penalty of removal from service upon the petitioner. The disciplinary authority has taken note of the medical certificate issued in favour of the petitioner certifying therein that the petitioner was suffering from chronic schizophrenia and was advised medical rest from 4th March, 1991 to 19th October, 1991. The total period for which the petitioner has not availed any leave was with effect from 23rd February, 1991 to 24th October, 1991. The petitioner aggrieved by the imposition of penalty of removal, preferred an appeal before the appellate authority on 17.3.1992. The appeal was disposed of by the appellate authority on 21st August, 1992. The revision petition preferred by the petitioner was also dismissed on 19th May, 1993. The petitioner approached this Court by way of CWP

No. 1010/1993 which was decided by a Division Bench of this Court on 27.8.2001. This Court was pleased to direct the appellate authority to decide the appeal within two months. The appellate authority had rejected the appeal on 7th June, 2002 (Vide Annexure P-24).

Mr. Bimal Gupta, Advocate appearing on behalf of the petitioner has strenuously argued that the penalty of removal imposed upon the petitioner is disproportionate to the alleged misconduct and the disciplinary authority has failed to take into consideration that the petitioner was suffering from chronic schizophrenia and was advised medical rest with effect from 4.3.1991 to 19.10.1991. Mr. Bimal Gupta, Advocate has also submitted that the appellate order is not a speaking order and the grounds mentioned in the appeal have not been considered by the appellate authority.

Mr. Sandeep Sharma, Assistant Solicitor General of India has supported the order dated 17th March, 1992 and order dated 7th June, 2002.

I have heard the parties and perused the record.

The only charge levelled against the petitioner was that he absented from the unit with effect from 23.2.1991 to 24.10.1991 without any valid permission from the competent authority. The Inquiry Officer has stated in narration of charge that the charged constable i.e. petitioner was suffering from mental disease, which may be called as chronic schizophrenia and the Medical Board of District Hospital Mandi has examined the constable on 19.10.1991 and declared the constable fit to discharge his duties. The petitioner was also produced before the Inquiry Officer after re-joining from long leave and it was noticed by him that the condition of the petitioner was abnormal and he was advised to get proper treatment from DSP Hospital. It has further come in the narration of facts

that since the petitioner was suffering from chronic schizophrenia he could not control himself and went to his native place instead of DSP hospital thinking that he might not get proper treatment there which he would get at his native place. The inquiry officer has stated as extracted above in the conclusion of enquiry report that the mental condition of the charged constable could not be over looked and as such recommended that the case may be considered taking into account his chronic disease from which he was suffering at the time of his desertion from the unit. This narration of facts and conclusion drawn by the inquiry officer in his inquiry report dated 16.1.1992 is based on the medical certificate made available before him as well as his own impression when he examined the petitioner himself. The disciplinary authority though has taken note of the petitioner's ailment i.e. chronic schizophrenia; still the penalty of removal from service has been imposed upon the petitioner. The petitioner as per punishment order was advised medical rest from 4th March, 1991 to 24th October, 1991 whereas the petitioner was absent without leave with effect from 23rd February, 1991 to 24th October, 1991. If the petitioner had been advised medical rest from 4th March 1991 to 24th October, 1991 then there is a difference of only 11 days before he absented himself and over stayed the period beyond the medical rest by five days. The positive finding recorded by the inquiry officer was that the petitioner was suffering from mental ailment and it was in those circumstances that he left for his home. The disciplinary authority has disbelieved the version of the inquiry officer merely by presuming that petitioner could not reach home when he was mentally sick.

This court is of the opinion that the penalty of removal from service imposed upon the petitioner is disproportionate. The petitioner has preferred the appeal against the imposition of penalty vide order dated

17.3.1992 which was decided by the appellate authority on 7th June, 2002. The appellate authority has not taken into consideration the ailment with which the petitioner was suffering i.e. mental ailment and accordingly upheld the order dated 17.3.1992. The appellate authority was bound to take into consideration the ailment of the petitioner and more particularly the observations made by the inquiry officer while holding the inquiry.

In the following judgments, the Hon'ble Supreme court has laid down the parameters within which the Courts can interfere with the punishment/penalty imposed by the disciplinary authority.

The Hon'ble Supreme Court in ***Chandra Vilash Rai Vs. State of Bihar and others (2003) 11 SCC 741*** while taking into consideration the long service of more than 20 years rendered by the delinquent have altered the punishment to one of the pre-mature retirement. The Hon'ble Supreme Court has held as under:

> **"Having examined the charges alleged and proved against the two delinquents, we cannot but observe that the charges are serious, more particularly, since they relate to affairs of a cooperative bank. But at the same time, it cannot be disputed that these delinquents have rendered services in the Society for more than 20 years. It also transpires that the so-called delinquency had not been committed on their own but at the behest of the Board of Directors, though in law such action would not exonerate the delinquents from the liabilities which they would incur for such illegalities and irregularities. In the aforesaid premises, we think it appropriate that ends of justice will be met if we alter the punishment of dismissal to one of premature retirement, as provided in the Staff Regulations of the Bank, which appear to have been framed by the Board in its resolution dated 12.3.1985 which punishment also is a major punishment and we accordingly so direct. If the delinquents are entitled to any retirement benefits on the basis of such premature retirement, those may be given to them. These appeals are disposed of accordingly."**

The Hon'ble Supreme Court has held in ***Dev Singh V. Punjab Tourism Development Corporation and another (2003) 8 SCC 9*** that if the punishment imposed by the disciplinary authority shocks the judicial conscience, the court can mould the relief. The Hon'ble Supreme Court has held as under:

> **"A perusal of the above judgments clearly shows that a court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief either by directing the disciplinary/appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this Court, if the punishment imposed by the disciplinary authority' is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.**
>
> **Applying the said principles laid down by this Court in the cases noted hereinabove, we see that in this case the appellant has been serving the respondent Corporation for nearly 20 years with unblemished service, before the present charge of misconduct was levelled against him. The charge itself shows that what was alleged against the appellant was misplacement of a file and there is no allegation whatsoever that this file was either misplaced by the appellant deliberately or for any collateral consideration. A reading of the charge-sheet shows that the misplacement alleged was not motivated by any ulterior consideration and at the most could be an act of negligence, consequent to which the appellant was unable to trace the file again. The disciplinary authority while considering the quantum of punishment came to the conclusion that the misconduct of the nature alleged against the appellant should be viewed very seriously to prevent such**

actions in future, whereby important and sensitive records could be lost or removed or destroyed by the employee under whose custody the records are kept. Therefore, he was of the opinion that a deterrent punishment was called for, forgetting for a moment that no such allegation of misplacing of important or sensitive record was made in the instant case against the appellant and what he was charged of was misplacement of a file, importance or sensitiveness of which was not mentioned in the charge-sheet. Therefore, in our opinion, the disciplinary authority was guided by certain facts which were not on record, even otherwise, we are of the opinion that when the Service Bye-laws applicable to the Corporation under Service Bye-law 17 provide various minor punishments, we fail to appreciate why only maximum punishment available under the said Bye-laws should be awarded on the facts of the present case. We think the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the same certainly shocks our judicial conscience. Hence, having considered the basis on which the punishment of dismissal was imposed on the appellant and the facts and circumstances of this case, we think to avoid further prolonged litigation it would be appropriate if we modify the punishment ourselves. On the said basis, while upholding the finding of misconduct against the appellant, we think it appropriate that the appellant be imposed a punishment of withholding of one increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority. We further direct that the appellant will not be entitled to any back wages for the period of suspension. However, he will be entitled to the subsistence allowance payable up to the date of the dismissal order."

The Hon'ble Supreme Court has held in ***Director General, RPF and others Vs. Ch. Sai Babu (2004) 4 SCC 331*** as under:

Normally, the punishment imposed by a disciplinary authority should be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment imposed is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved against, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained, and the department/establishment in which the delinquent person concerned works.

In a recent judgment, the Hon'ble Supreme Court in ***Management of Coimbatore District Central Cooperative Bank Vs. Secretary, Coimbatore District Central Cooperative Bank Employees Association & another 2007 (6) Scale 45*** with regard to doctrine of proportionality has held as under:

"So far as the doctrine of proportionality is concerned, there is no gainsaying that the said doctrine has not only arrived at in our legal system but has come to stay. With the rapid growth of Administrative Law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by Courts. If an action taken by any authority is contrary to law, improper, unreasonable, irrational or otherwise unreasonable, a Court of Law can interfere with such action by exercising power of judicial review. One of such modes of exercising power, known to law is the 'doctrine of proportionality'

'Proportionality' is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise -the elaboration of a rule of permissible priorities.

de Smith states that 'proportionality' involves 'balancing test' and 'necessity test'. Whereas the former ('balancing test') permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter ('necessity test') requires infringement of human rights to the least restrictive alternative. ['Judicial Review of Administrative Action '; (1995); pp. 601-605; para 13.085; see also Wade & Forsyth; 'Administrative Law '; (2005); p.366].

In Halsbury's Laws of England, (4th edn.); Reissue, Vol.1(1); pp.144-45; para 78, it is stated;

"The court will quash exercise of discretionary powers in which there is no reasonable relationship between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct. The principle of proportionality is well established in European law, and will be applied by English courts where European law is enforceable in the domestic courts. The principle of proportionality is still at a stage of development in English law; lack of proportionality is not usually treated as a separate ground for review in English law, but is regarded as one indication of manifest unreasonableness."

The doctrine has its genesis in the field of Administrative Law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without abuse of discretion. There can be no 'pick and choose', selective applicability of Government norms or unfairness, arbitrariness or unreasonableness. It is not permissible to use a 'sledge-hammer to crack a nut'. As has been said many a time; "Where paring knife suffices, battle axe is precluded".

In the celebrated decision of Council of Civil Service Union (CCSU) v. Minister for Civil Service, (1984) 3 All ER 935: (1984) 3 WLR 1174: (1985) AC 374 (HL), Lord Diplock proclaimed;

"Judicial review as I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality '... " (emphasis supplied)

CCSU has been reiterated by English Courts in several subsequent cases. We do not think it necessary to refer to all those cases.

So far as our legal system is concerned, the doctrine is well-settled. Even prior to CCSU; this Court has held that if punishment imposed on an employee by an employer is grossly excessive, disproportionately high or unduly harsh, it cannot claim immunity from judicial scrutiny, and it is always open to a Court to interfere with such penalty in appropriate cases.

In Hind Construction Co. v. Workmen, (1965) 2 SCR 85: AIR 1965 SC 917, some workers remained absent from duty treating a particular day as holiday. They were dismissed from service. The Industrial Tribunal set aside the action. This Court held that the absence could have been treated as leave without pay. The workmen might have been warned and fined. (But) "It is impossible to think that any reasonable employer would have imposed the extreme punishment of dismissal on its entire permanent staff in this manner. " The Court concluded that the punishment imposed on the workmen was not only severe and out of proportion to the fault, but one which, in our judgment, no reasonable employer would have imposed. (emphasis supplied)

In Indian Chamber of Commerce v. Workmen, (1972) 1 SCC 40 : AIR 1972 SC 763, the allegation against the employee of the Federation was that he issued legal notices to the Federation and to the International Chamber of Commerce

which brought discredit to the Federation –the employer. Domestic inquiry was held against the employee and his services were terminated. The punishment was held to be disproportionate to the misconduct alleged arid established. This Court observed that "the Federation had made mountain out of a mole hill and made a trivial matter into one involving loss of its prestige and reputation.

In Ranjit Thakur referred to earlier, an army officer did not obey the lawful command of his superior officer by not eating food offered to him .Court Martial proceedings were initiated and a sentence of rigorous imprisonment of one year was imposed. He was also dismissed from service, with added disqualification that he would be unfit for future employment.

Applying the doctrine of proportionality and following CCSU; Venkatachaliah, J. (as His Lordship then was) observed:

"The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial if the decision of the court even as to sentence is an outrageous defence logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review. " (Emphasis supplied)

From the above decisions, it is clear that our legal system also has accepted the doctrine of proportionality. The question however, is whether in the facts and circumstances of the present case, the High Court was justified in invoking and applying the doctrine of proportionality .In our judgment the answer must be in the negative. Normal when disciplinary proceedings have been initiated and finding of fact has been recorded in such inquiry, it cannot be interfered with unless such finding is based on 'no evidence or is perverse, or is

such that no reasonable man in the circumstances of the case would have reached such finding. In the present case, four charges had been levelled against the workmen. An inquiry was instituted and findings recorded that all the four charges were proved. The Labour Court considered .the grievances of the workmen, negatived all the contentions raised by them, held the inquiry to be in consonance with principles of natural justice and findings supported evidence. Keeping in view the charges proved, the Labour Court, in our opinion rightly held that the punishment imposed on workmen could not be said to be harsh so as to interfere with it."

In view of the law pronounced by the Hon'ble Supreme Court in the above cited cases, now this court has to determine whether the penalty of removal imposed upon the petitioner on 17.3.1992 is disproportionate or not. The charge levelled against the petitioner is that he absented himself without leave with effect from 4.3.1991 to 19.10.1991. The inquiry officer has taken note of the ailment of the petitioner on the basis of the certificate issued by the Board of Doctors of District Hospital Mandi on 19.10.1991. The inquiry officer had seen the condition of the petitioner himself when he was brought before him. He has also narrated in his conclusion that the mental condition of the petitioner could not be over looked and as such recommended that the case may be considered taking into account his chronic disease from which he was suffering. The disciplinary authority has failed to take into consideration the circumstances under which the petitioner remained on leave. The medical certificate issued by the Board of Doctors of the District Hospital, Mandi could not have been over looked by the disciplinary authority. The recommendations of the inquiry officer, though not binding on the disciplinary authority, were required to be given due weightage. The fact that the petitioner has also been advised medical rest with effect from 4.3.1991 to 19.10.1991 and he had proceeded to his home on 23.2.1991

upto 24.10.1991, there is a difference of only 16 days for which the penalty of removal could not be imposed upon the petitioner.

This court is of the firm view that the imposition of penalty of removal is disproportionate and some alternative penalty could have been inflicted upon the petitioner. The appellate authority has also failed to take into consideration the circumstances in which the petitioner has absented himself with effect from 23.2.1991 onwards. The appellate authority has only considered the version of the department but has failed to take into consideration the version put forth by the petitioner.

The upshot of the above discussion is that the penalty of removal imposed upon the petitioner is disproportionate to the alleged misconduct.

In view of the peculiar facts and circumstances of the case as discussed herein above, the writ petition is allowed accordingly. The orders dated 17.3.1992 and 7.6.2002 are quashed and set aside and the penalty of 'removal from service' is substituted by the penalty of 'compulsory retirement' with all consequential benefits to be worked out and paid by the respondents within a period of six months from the receipt of certified copy of this judgment .

(Rajiv Sharma), Judge

May 29, 2007
Awasthi